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# Supreme Court of the United States

OCTOBER TERM, 1933.

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No. 80.

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LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

against

HAMBURG AMERIKANISCHE PACKETFAHRT AKTIENGESELLSCHAFT,

Respondent.

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*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petition of Hamburg Amerikanische Packetfahrt Aktiengesellschaft, by the counsel undersigned, respectfully prays for a rehearing of the above-entitled cause, and, in support thereof, respectfully refers to the following matters:

## I.

**The Court's decision that the *Isis* was unseaworthy on sailing from Bremen because her rudder was lashed amidships.**

The Court's opinion with respect to the above reads as follows (printed opinion, p. 7):

"The fact is undisputed that the rudder, being disabled, was useless as an instrument to control the movement of the

vessel. There is *evidence* that in addition to being useless it was positively harmful by reason of a bend to starboard. These two defects *together* defeat the carrier's endeavor to shift the risk upon the cargo.

The respondent insists that a vessel may be seaworthy though she is navigated by tugs. *No doubt that is true where the rudder is capable of use.* This is far from saying that the risk to the cargo is not appreciably increased if the rudder is out of commission and so incapable of giving aid when an emergency arises. There is no need to go beyond the pages of this record for proof that this is so. Witnesses for the respondent tell us that a vessel with her rudder lashed may be towed without risk if the speed of the tugs is slow, less than seven *kilometers* an hour. They admit that the useless rudder becomes a source of danger if the speed of the tugs is higher, seven *kilometers* or more." (Italics ours.)

The opinion then refers to the findings below that "the *Isis* was proceeding when she sighted the upbound steamer at a speed of more than eight *kilometers* an hour."

The Court has confused kilometers with knots. The evidence of the respondent's witnesses was that the vessel might be towed with her rudder lashed without risk if the speed was less than 7 *knots* an hour—not *kilometers*. The evidence is as follows (Davis, p. 410):

"I think that is perhaps the point where the tugs would be as efficient as the engine (rudder?), say somewhere between 5 and 7 knots. Above that there is no question that the rudder would be more efficient and the tugs less. I say 7 knots would be the dividing line.

Q. Below 5 you would consider the tugs were better? A. Yes.

Q. Between 5 and 7 they are about equal, is that what you have in mind? A. Yes, that is my opinion.

Mr. Haight: Knots?
Mr. Longley: Yes."

The opinion is therefore in error in the assumption that 8 kilometers (which is the equivalent of only 4.316 knots) was more than the speed approved by the respondent's wit-

nesses. Even if the speed through the water, after adding the current, was 11 kilometers, that was the equivalent of only 5.935 knots. That speed was too great to maintain in running close to the bank and passing another vessel, but it was a speed at which tugs were more efficient than a rudder.

The opinion continues (p. 8):

"The speed and the place would in all likelihood have been harmless if she had been navigating the river with her steering gear in order. The carrier sent her forward with her steering gear crippled when there was opportunity to make it sound. No doubt there are occasions when owner and master are left without a choice. The vessel may be disabled at a place where the making of repairs is impossible or unreasonably difficult. In such circumstances she must go her way with such help as can be gathered. Here no emergency was present to excuse the decision that was made. The carrier would have had no difficulty in making the repairs at Bremen. The risks of navigation that are cast by statute upon the owners of the cargo are those that remain after the carrier has done his duty. They do not include risks that would have been avoided or diminished if the vessel had gone out with her equipment staunch and sound. A carrier who chooses for his own purposes to send out a crippled ship with needless enlargement of the perils of navigation will not receive exemption at the cost of the owners of the cargo if the perils thus enlarged have brought the ship upon the sands."

We understand from the above quotation that the Court has decided the following points against the respondent:

(1) That because the rudder was lashed and therefore "useless as an instrument to control the movement of the vessel," the *Isis* was unseaworthy to proceed with the assistance of tugs and her owners must be denied the protection of the Harter Act.

(2) That, even though the fact has been found that the stranding occurred because the *Isis* was navigated at too high a speed and too close to the edge of the channel, nevertheless her owner is deprived of the right to general average con-

tribution because "the speed and the place would *in all likelihood* have been harmless if she had been navigating the river with her steering gear in order."

(3) That "no emergency" existed at Bremen, *because* "the carrier would have had no difficulty in making the repairs" there.

(4) That, since the risks of the trip from Bremen to Hamburg could have been "avoided or diminished" by drydocking and repairing the *Isis* at Bremen, failure to do so was a breach of duty which deprived her owners of the protection of the Harter Act.

(5) That the owners of the *Isis* chose, *for their own purposes*, to send out a crippled ship.

The Court is respectfully requested to reconsider these rulings.

(1) We submit that the fact that the rudder was lashed amidships did not render the *Isis* unseaworthy when accompanied by tugs. In all of the great harbors of the world, it is daily practice to tow steamers from point to point with no steam at all on their boilers, so that their steering engines cannot be worked at all. To condemn this practice is to go directly counter to the usage of practical navigators the world over. Some vessels, in fact, are not equipped with steering apparatus at all and tugs are relied upon entirely for the purpose of steering.

The well-known practice of towing steamers without steering power is referred to in *Gilchrist Transportation Co.* v. *Great Lakes Towing Co.*, 237 Fed. 432 (see middle of p. 435, bottom of p. 437, middle of p. 439).

In *The Barendrecht*, 9 Fed. (2d) 614 (C. C. A., 2nd Cir.), the steamer so named, while being towed from Brooklyn to Bayonne, came into collision with another vessel. At the time of the towage the *Barendrecht* was without steam for power or even to sound her whistle and the Court held that this was not a fault.

Many instances of such towage are referred to in the record in the case now before the Court (R. 165, 174, 175, 177, 198, 208-210, 222-225, 230-232). And the *Isis* was, of course, not without *steering power,* because by maneuvering her twin screws her course could be altered to port or starboard, as occasion might require.

Fourteen witnesses, including eleven familiar with the Weser River, testified that the *Isis* was seaworthy to proceed with the tugs (respondent's principal brief, p. 29). No one testified to the contrary, except three witnesses called by the libelant, only one of whom was a navigator. The opinion, in its finding that the *Isis* was not seaworthy to proceed, ignores the overwhelming weight of evidence, as well as the findings of the Commissioner and of the District Court.

(2) It is submitted that no navigator could know, and that no court can find, that a ship, which has sheered when going too fast in a shallow river, "in all likelihood" would not have done so if, in place of three tugs, she had had the benefit of a rudder in perfect working order. Of course, if the rudder of the *Isis* had not been damaged, she would not have had the assistance of any tugs at all; but, assuming that she had been proceeding with her rudder uninjured, the suction exerted upon a flat-bottomed cargo boat navigating a shallow river, when she runs too close to the bank, is such as to render any rudder inefficient. "Smelling the ground" is a perfectly well-known phenomenon and must always be guarded against when navigating shallow water, and the one way to do so is to run slowly and keep the vessel under control (*The Howard Reeder,* 207 Fed. 929, 934 [C. C. A., 4th Cir.]; *The Varanger,* 45 Fed. [2d] 608, 612). We quote the following from *Marsden on Collisions at Sea* (8th Ed., p. 467):

"In the case of a steamship navigating the Goole reach of the river Ouse, where the water was so shallow that there was risk of her smelling the ground and failing to answer her helm, it was held to be her duty, by occasionally stopping

her engines, to diminish her way, and so be well under control in case of emergency; and she was held in fault for neglect of this precaution" (citing *The Ralph Creyke,* 6 Asp. M. C. 19; *The Highland Star,* 7 L. L. Rep. 240).

A similar difficulty arises when two vessels come in too close proximity to each other. By virtue of the suction so created, a collision is liable to be caused, and in the case of such collisions it has never been possible to prevent them by the use of the ship's rudder (see *Olympic* v. *H. M. S. Hawke,* [1913] Probate, 214; [1915] App. Cas. 385; *The City of Cleveland,* 56 Fed. 729, opinion by Mr. Justice Brown when District Judge; *The Ohio,* 91 Fed. 547, opinion by Mr. Justice Lurton when Circuit Judge).

In the *Olympic-Hawke* collision, the subject of suction was dealt with at length and it was found that the *Hawke* became entirely unmanageable, because of the suction of the *Olympic.* Lord Parker said:

"Further, on the evidence in the Court below, the forces of interaction between the two vessels at a distance of 300 yards would be negligible and could probably be counteracted by helm action *at any distance beyond 200 yards*" (p. 272).

We submit that the evidence in this case clearly proves, as the Commissioner found, that the second stranding of the *Isis* occurred because she was being navigated at improper speed too close to the bank and not because she was herself unfit to make the trip down the river, with twin screws and three tugs assisting her. That being the case, the stranding was not due to the unfitness of the ship. If she had been navigated *at the same speed,* with no tugs, the risk of her becoming unmanageable because of suction would have been far greater, not less.

(3) and (4) We submit that an "emergency" did exist at Bremen and that it was a real and a very practical one. The Hamburg-American Line, as carrier, was bound to consider the interests of its shippers in handling the situation. It

could not fairly destroy a substantial part of the value of the cargo by incurring needless expenditure. If there were two ways of handling the situation, this Court has ruled that the carrier was bound to choose the one which presented the greatest safety, *from the standpoint of navigation*, regardless of cost. We submit that the right rule is that, if there were two ways of handling the situation, both of which were reasonably safe, the carrier should take the one which was the less expensive (*Phelps* v. *Hill*, L. R. [1891] 1 Q. B. 605; *Carver, Carriage by Sea*, 7th Ed., Sec. 291).

The average adjustment which is in evidence (Exhibit 16) in this case shows that the present libelant's cargo was only 48½ per cent. of the total values involved when the *Isis* left Bremen. We submit that the Court has overlooked the fact that all of the *Isis'* hull underwriters and all of the German cargo underwriters who have not sued were consulted before the towage was undertaken and that they agreed that the rudder should be lashed and the ship assisted by tugs. Surely a carrier cannot be charged with a breach of duty towards his cargo if he follows a course which all of the cargo underwriters who are available consider safe and which they prefer, because it will save them a large amount of money. The underwriters of the libelant's cargo were not consulted only because they were unknown and could not be reached within the time available. It is hard to believe that, if consulted, they would have declined to follow the lead of the German underwriters, but suppose that they had declined, what then would have been the result? After consulting all of the hull underwriters and 38½ per cent. of the cargo underwriters, and being advised of their preference, if the Hamburg-American Line had disregarded their wishes and had docked the *Isis* in Bremen and repaired her there, the underwriters who had been consulted would have refused to pay their proportion of a general average stated on *that* basis, and we submit that they would have been justified in claiming that they were not chargeable for the cost of discharging the cargo, storing it, insuring it, reloading it (with all of the attendant risks of damage and the certain loss of interest through

delay), and, in addition, the wages and maintenance of the crew of the ship, all of which would have entered into the general average statement.

The Court, in its opinion, has stated that the risk to the cargo was improperly increased by sending the *Isis* from Bremen to Hamburg in tow. We submit that, if properly handled, the *Isis* was far safer with three tugs than she would have been if navigating under her own steam, but, even if it is thought, *after the event*, that the *Isis* would have been safer if she had proceeded with her rudder in working order, rather than with the assistance of the tugs, the fact remains that this was not the view of the interested parties, when the question was up for decision, and that, in order to repair the rudder, the cargo must have been subjected to both the expense and the risks above referred to.

The choice which had to be made by the Hamburg-American Line and by the hull and cargo underwriters who were consulted was not between two courses, one of which was safe and the other dangerous, but between two alternatives, each of which involved some risk, because of the first stranding, for which, admittedly, the respondent was not legally to blame.

We submit that an owner should not be held to have failed to exercise due diligence if he has sent a diver down and examined the rudder of his ship and received the report that it is fair; if, as an extra precaution, he has docked his ship and exposed the rudder as far as is safe, and has found it fair; if the balance of the rudder has been examined by a straight edge, under water, and has again been reported fair; and if, having reported the facts to his own underwriters and to all the cargo underwriters who are within reach, it has been agreed, as in this case, that the vessel should proceed with the assistance of tugs.

It cannot properly be contended, of course, that the stranding *ipso facto* proved unseaworthiness. Strandings in narrow rivers frequently result from treacherous currents, crowding by other vessels, or negligent navigation. Nor can it properly be said that a vessel is unseaworthy because not in the

highest degree of seaworthiness on sailing. As said in *The Marlborough*, 47 Fed. 667, at p. 670:

"The vessel must be reasonably safe for the service and voyage undertaken. There are, however, degrees of safety; and she need not be the safest."

As said also in *The Allie*, 24 Fed. 745, at p. 749:

"* * * unseaworthiness is not made out by showing that 'a stouter ship might have survived the peril.' Amies v. Stevens, 1 Strange, 128."

In *Elder Dempster & Co.* v. *Paterson*, 1924 A. C. 522, at 558, Lord Sumner said that "a ship does not become unseaworthy merely because her construction or appliances are not foolproof."

The test is thus stated in *Carver, Carriage by Sea* (7th Ed., Sec. 18), "She (the ship) must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, *having regard to all the probable circumstances of it.*"

The opinion of the Court also refers to the bend of not to exceed 5 degrees in the lower outer corner of the rudder. The Court does not, however, find that this alleged defect, in and of itself, made the *Isis* unseaworthy and the findings below are to the contrary. The Circuit Court of Appeals said (R. 561) that this bend "would not account for the second stranding," and that "it was established" that the bend "had no effect upon the navigation of the vessel."

(5) It is submitted that there is no evidence in this case which justifies the finding that the Hamburg-American Line chose "*for its own purposes* to send out a crippled ship." In fact, the Court states that this was done "to save time and expense to the vessel *and her cargo*" (opinion, p. 2).

As pointed out in our main brief, if the *Isis* had, in the first instance, been held at Bremen for repairs, four-fifths of the entire expense of the repairs and of the discharge, storage and reloading of the cargo would have been paid by the cargo, including the present libelant. In other words, it was chiefly for the benefit of the cargo that towage was decided upon.

II

## Proximate cause and the Harter Act.

The general importance of this part of the Court's decision cannot be overstated. Either by the force of the statute, or by special contract, the carrier's liability for practically every pound of cargo carried by sea in the foreign and domestic commerce of the United States is regulated by the provisions of the Harter Act and the construction of that Act affects not only claims for cargo damage but also adjustments of general average. The rule of law which will be established by this case is, therefore, very far-reaching and all of those who are engaged in foreign trade—shippers, consignees, carriers, bankers and cargo underwriters—are vitally interested both in its substance and in its form. Indeed, next only to the importance of the principle to be declared is the importance that its declaration shall be so clear that it can be understood by the interested parties and applied by the lower courts with precision so as to avoid a mass of new litigation.

Before the passage of the Harter Act, all agreements entered into between the carrier and the shipper, which sought to excuse the carrier from liability for the negligence of his servants, were held to be contrary to public policy and void. In this particular our law differed from that of practically every other important commercial country in the world (*Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 443, 447).

In 1893 Congress passed the Harter Act and, by so doing, brought our law more nearly into accord with that of Great Britain and the other commercial nations. The purpose of that Act was two-fold: (1) to maintain, for the benefit of cargo, the rigid obligations of the carrier properly to load, stow and care for the cargo and to make his ship "seaworthy and capable of performing her intended voyage," and (2) to relax the rule which had previously existed as to the carrier's liability for the errors of his servants in the navigation and management of the ship.

For the convenience of the Court, the entire text of the Harter Act is printed as an appendix hereto. Sections 1, 2 and 3 are the only ones which are important in the present discussion, the first two being for the benefit of cargo and the third for the relief of carriers.

It is submitted that these three sections *must be read together*, in order to understand either the sections themselves or the purpose of Congress in enacting them. Section 3 cannot be read alone and, on the face of it, it cannot be construed literally, since such a construction would lead to results which are obviously impossible. Construed literally, it would mean that if the owner of a vessel has *not* exercised due diligence to make her in all respects seaworthy, he will be responsible for the damage resulting from *all* of the causes enumerated in the section. It is submitted, however, as already stated, that such construction is impossible. For instance, if a ship should inadvertently sail from New York for Rotterdam without a chart of the English Channel, she would not be "in all respects properly equipped and supplied," but it cannot be the intention of this Court to hold that, in that event, her owners would be responsible to the shippers if the vessel were struck by lightning, or was sunk by a submarine, or if her cargo deteriorated on the voyage because of some inherent defect, the ship having arrived safely at Rotterdam, without a chart.

Section 3 certainly was not drafted by anyone who understood the technical rules of the maritime law. No skilled draftsman would have grouped together in the same section, and with no separation other than a comma, causes for which a carrier was responsible and other causes, such as acts of God and the public enemies, for which he never had been held responsible even under the most rigid rules of the common law. But while an artistic result was not accomplished, it is submitted that the purpose of Congress was clear and that that purpose was to bring our law into conformity with that of the other commercial nations and to relieve carriers from a liability which had proved to be too burdensome and which it was considered the shippers and the cargo under-

writers should bear. Congress wanted to preserve, intact, the most rigid obligations of the carrier as to providing a seaworthy ship and as to the proper stowage and custody of the cargo. It also wanted to relieve the carrier from cargo damage resulting from errors of navigation and errors in management, *unless that damage had been caused or contributed to by some failure on the part of the carrier to perform his obligations imposed under Sections 1 and 2 of the Act.*

If a vessel sails with an intoxicated harbor pilot, but if she does in fact proceed safely out of the harbor and discharges the pilot, and has a collision ten days after, it seems impossible that her rights under the Harter Act can be affected by the condition of her pilot 3,000 miles back.

We submit that Congress never intended that Section 3 should be construed as a conditional offer, which must be accepted literally as made. On the contrary, Congress intended to grant a reasonable exemption to the carriers engaged in the American trade, so that the obligations of those carriers and the responsibilities of the cargo underwriters would be similar to those incurred in trade with other countries. The decision of this Court, however, grants to American and foreign underwriters who insure cargo bound to or from this country rights against the carriers which are unheard of in any other jurisdiction.

The Court states its construction of Section 3 of the Act as follows (opinion, p. 10):

"The statute, aided by the contract, gives the shipowner a privilege upon his compliance with a condition. If he would have the benefit of the privilege, he must take it with the attendant burden. There would be no end to complications and embarrassments if the courts were to embark upon an inquiry as to the tendency of an unseaworthy defect to aggravate the risk of careless navigation."

This means, as we understand it, that a shipowner may not rely upon the Harter Act if, through any oversight, his ship is not *"in all respects"* seaworthy, even if there is no

possible connection between the unseaworthiness and the loss. This ruling the Court is asked to reconsider.

The term "seaworthy," as used to-day, has the broadest meaning. It does not mean merely that the ship must be fit to withstand the force of the wind and the waves, but that she must be fit to carry the cargo which is received, and she must be fit in *every* compartment, and for each *kind* of cargo. Thus a ship is unseaworthy if, when carrying horses, she has become infected because a prior shipment of horses suffered from foot and mouth disease (*Tattersall* v. *National S.S. Co.*, 12 Q. B. 297); if she loads lemons, knowing that she must be fumigated at a later port where the lemons will be injured (*Ciampa* v. *British India Co.*, L. R. [1915] 2 K. B. 774); if the machinery serving her refrigerating compartment is out of order (*The Southwark*, 191 U. S. 1; *Cargo per Maori King* v. *Hughes*, L. R. [1895] 2 Q. B. 550); if her strong-room is not strong enough to keep out thieves (*Queensland National Bank* v. *P. & O. S. N. Co.*, L. R. [1898] 1 Q. B. 567). So a vessel loading asphalt may be unseaworthy if fitted with permanent battens which are not lined so as to make her fit for asphalt (*Dene Steamship Co.* v. *Tweedie Co.*, 143 Fed. 854, C. C. A.)

The general principle is summed up in *Carver on Carriage by Sea*, 7th Ed., Sec. 19a, as follows (pp. 29-30):

"This warranty is not limited to the mere fitness to encounter sea perils. If the ship is to carry goods of a particular kind, the implied warranty requires that the ship and her equipment be fit for the purpose of safely carrying those goods to their destination.

Thus, where the contract is for the carriage of frozen meat in a ship fitted with refrigerating machinery, there is an implied warranty that the ship and refrigerating machinery are fit to receive and carry the frozen meat safely on the agreed voyage.

* * * * * * *

And where specie is to be carried in one of the class of ships which are provided with strong rooms for that purpose, so that the contract is presumably made in relation to carriage in such a room, there is an implied warranty that the strong room is reasonably fit to resist thieves.

In certain cases of this nature it is necessary to distinguish between unseaworthiness and bad stowage not amounting to unseaworthiness. Thus in Upperton v. Union Castle Mail Steamship Co., 8 Com. Ca. 96; 9 Com. Ca. 50, passengers' luggage received at an intermediate port was stowed in a lavatory and became damaged owing to a negligent user of an adjoining lavatory; it was held to be a case of unseaworthiness, since the lavatory was an improper receptacle, but was the only receptacle available when the luggage was shipped."

In *The Indrapura*, 178 Fed. 591, the Court said (p. 594):

"There can be little question that a vessel seaworthy as to navigation may be unseaworthy as to cargo. So a ship may be seaworthy as to one part of the cargo and unseaworthy as to another. * * * The term 'seaworthy' in its earlier use, it must be admitted, was not of as broad or extended signification as under the present advanced state of commerce and transportation facilities; but it now has relation to the article carried, and the different compartments of the ship and their particular use as well as to the navigability of the ship. The Southwark, supra; The Thames, 61 Fed. 1014, 10 C. C. A. 232; The British King, (D. C.) 89 Fed. 872."

A ship may also be unseaworthy as to her crew or as to her passengers or her passengers' baggage, as shown above.

These various illustrations of the meaning of the word "seaworthy" are given in order to test the majority opinion of the Court. Is it possible that Congress, when enacting a statute to bring our law into line with that of other countries, really intended that, if a few boxes of tea were stowed in a compartment in which apples had been carried, or if the cattle fittings for fifty mules were not sufficiently strong, or if the pipe from a lavatory leaked into a baggage room containing a few trunks, then the carrier should be responsible, not merely for the damage done to the tea and to the cattle and to the trunks, but for the loss of the entire cargo of the ship, in the event that she was sunk by a collision, whether or not due to negligent navigation, or by a submarine, or was struck by lightning?

It is submitted that it cannot be assumed that Congress ever intended to produce such results, and that the decision

of this Court is not supported by the authorities referred to in the opinion. It is there stated that "the maritime law abounds in illustrations of the forfeiture of a right or the loss of a contract by reason of the unseaworthiness of a vessel, *though the unseaworthy feature is unrelated to the loss.*" Every authority which is relied upon to support this statement is taken from the realm of marine insurance and from that feature of it which has to do with misrepresentation or concealment in the securing of the policy or with the violation of an express or an implied warranty contained in the policy.

The difference between a contract of marine insurance and a contract for the carriage of goods is fundamental. A marine underwriter agrees to insure subject to certain conditions, express or implied; when these conditions are not complied with, the contract is at an end. That is not the effect of a breach of a warranty of seaworthiness as regards a contract for the carriage of goods; on the contrary, the contract of carriage still remains in effect (*Kish* v. *Taylor,* L. R. [1912] A. C. 604). Although the ship may be unseaworthy, the shipowner is still entitled to the freight (see *Parsons on Shipping,* pp. 285, 320).

As was said in *The Malcolm Baxter, Jr.,* 277 U. S. 323, at pp. 331, 333:

"Unseaworthiness * * * displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness. * * * The clauses of the bill of lading remain effective."

A shipowner does not become liable for damage to cargo merely because his ship is unseaworthy; the unseaworthiness must proximately cause the loss (*The Europa,* L. R. [1908] Probate 84; *The Malcolm Baxter, Jr., supra; The Francis Wright,* 105 U. S. 381, 387). As said in *The Malcolm Baxter, Jr.,* referring to an earlier decision, at p. 334:

"* * * the rule *causa proxima non remota spectatur* applied to contracts of common carriers as to others. There has been no departure from this rule and we see no reason for departing from it now."

A bill of lading clause requiring that notice of claim be given within thirty days from the date of the bill of lading is applicable and protects the shipowner, even though the vessel was plainly unseaworthy on sailing (*The Queen of the Pacific,* 180 U. S. 49).

It is respectfully submitted, therefore, that the Harter Act is not properly to be construed like a policy of marine insurance but rather as a contract of carriage and that unseaworthiness not causing a loss is to be disregarded.

And even in the field of marine insurance, breach of a warranty does not always discharge the insurer irrespective of causal connection. Thus in *Smith* v. *Northwestern F. & M. Ins. Co.,* 246 N. Y. 349, 361 (cited by this Court), the Court, in speaking of the continuing duty to keep a vessel seaworthy, said:

"Indeed, the breach of the implied warranty does not even suspend the risk in the absence of a causal relation between breach and loss."

As to the last sentence in the extract of the opinion above quoted, which refers to the "complications and embarrassments" which would ensue if the Court were to endeavor to determine "the tendency of an unseaworthy defect to aggravate the risk of careless navigation," we submit that the Courts would be required to do no more than to apply the well-known rule of proximate cause, which is a well nigh universal principle in the law. A vessel, for instance, sails without one of her mates; immediately after sailing a collision occurs and litigation takes place between the vessels, no question as to cargo being involved. The question before the Court is whether the absence of the mate contributed to the collision. So, when a lookout is not stationed (*The Bluejacket,* 144 U. S. 371).

In the latter part of its opinion, the Court states that, where unseaworthiness "is the basis of a suit for damages * * *, there can be no recovery of damages in the absence of a causal relation between the loss and the defect" (p. 13). In that class of case, and in other maritime litigation, the usual rule of proximate cause is adhered to and it causes no embarrassment.

A statute might, of course, be passed which would make the shipowner an insurer of the cargo if the ship was unseaworthy in the slightest degree and even though the unseaworthiness did not render her unfit as a ship but related solely to an insignificant part of the cargo or the baggage. We submit, however, that such an extraordinary intent is not to be presumed. Every statute must be construed in accordance with the rule of reason (*Standard Oil Co.* v. *United States,* 221 U. S. 1).

It is respectfully asked that a rehearing be granted on the foregoing grounds.

CHARLES S. HAIGHT,
JOHN W. GRIFFIN,
Counsel for Respondent.

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We, CHARLES S. HAIGHT and JOHN W. GRIFFIN, counsel for the respondent above named, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

CHARLES S. HAIGHT,
JOHN W. GRIFFIN,
Counsel for Respondent.

# APPENDIX.

## The Text of the Harter Act.

ACT OF FEBRUARY 13, 1893:

SEC. 1. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

SEC. 3. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or

owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SEC. 4. It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping documents, stating, among other things, the marks necessary for identification, number of packages or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

SEC. 5. For a violation of any of the provisions of this Act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding $2,000. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. This Act shall not be held to modify or repeal sections 4281, 4282, and 4283 of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners or representatives.

SEC. 7. Sections 1 and 4 of this Act shall not apply to the transportation of live animals.